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Global Environmental Law and Comparative Legal Methods

Elisa Morgera*

Abstract: This article identifies significant points of contact between the scholarship on comparative law and on global law and discusses how they can provide the building blocks for embedding more explicitly comparative legal methods into the growing scholarly debate on global environmental law. To set the terms for a more systematic debate, the article focuses, in turn, on the evolving understanding of the nature and scope of comparative law as a discipline, its different functions in the context of current global environmental law practice, and the variety of comparative legal methodologies, including inter-disciplinary ones, that appear of relevance for global environmental lawyers. On these bases, the article concludes by reflecting on the nature of global environmental law and the role of global environmental lawyers.

Keywords: global environmental law, comparative law, global law, methodology

The main textbooks on comparative law do not feature chapter-length discussions of environmental law.¹ Occasionally, however, they include intriguing remarks on it as a salient example of the "staple problems of comparative law" involving both public and private law questions,² or of "socio-technical types of problem-oriented laws"³ that represent a form of counter-hegemonic collaboration to address global environmental challenges.⁴ Collaboration and deeper mutual understanding among environmental lawyers across different legal traditions has been identified by comparative lawyers as necessary for the resolution of global environmental problems.⁵ The interactions between environmental law and the customary laws of indigenous peoples have also attracted the attention of comparative lawyers, either because references to indigenous peoples' customary laws are used to criticize regulatory approaches to environmental management,⁶ or because, also due to

* Corresponding author: elisa.morgera@ed.ac.uk. The author is extremely grateful to Neil Walker, Apolline Roger, Michael Mehling, Lorenzo Cotula, Eric Descheemaeker and an anonymous reviewer for their comments and suggestions.

¹ Eg, M. Reimann and N. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2007); E. Özüçü and D. Nelken (eds.) *Comparative Law: A Handbook* (Hart, 2007); M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012); P. de Cruz, *Comparative Law in a Changing World* (3rd ed, Routledge, 2007); and J. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006).

² A. Harding and P. Leyland, 'Comparative Law in Constitutional Contexts' in E. Orucu and D. Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 313, at 325.

³ D. Nelken, 'Comparative Law and Comparative Legal Studies' in E Orucu and D Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 3, at 4.

⁴ M Siems, *Comparative Law* (Cambridge University Press, 2014) at 101 and 189-190.

⁵ P Glenn, *Legal Traditions of the World* (4th Ed, Oxford University Press, 2010), at xxvi.

⁶ Ibid., at 375.

international law, limitations are imposed on indigenous peoples' customary laws related to their socio-cultural use of natural resources.⁷ On the environmental side, thought-provoking pieces of environmental legal scholarship have been published in leading comparative law journals.⁸ In addition, there are specialized comparative environmental law journals,⁹ and certain areas of environmental law have been researched in a comparative perspective to a significant degree.¹⁰ Nonetheless, limited reference to the methodological debates in comparative law can be found in environmental legal scholarship.¹¹ It has also been remarked that comparative environmental law remains "a marginal sub-field," possibly because domestic and international environmental lawyers "continue to inhabit relatively distinct scholarly domains."¹²

This article and the present special issue aim to tackle the apparent disconnect. In particular, this contribution will put forward the argument that there are significant points of contact between the scholarship on comparative law and on global law that could provide the building blocks for embedding more explicitly comparative legal methods into the growing scholarly debate on global environmental law (section 1). To set the terms of a more systematic debate, the evolving understanding of the nature and scope of comparative law as a discipline will be discussed first (section 2), and its different functions in the context of current global environmental law practice will be outlined (section 3). The article will then discuss certain key methodological questions (section 4), including from an inter-disciplinary perspective (section 5). to conclude with a reflection on the nature of global environmental law and the role of global environmental lawyers (section 6).

1. Global Environmental Law

The concept of global environmental law has attracted the attention of international environmental lawyers, as it interrogates the evolution of international environmental

⁷ R. Sacco, 'The Sub-Saharan Legal Tradition' in M. Bussani and U. Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012), 313, at 333.

⁸ To name just an example, J. Scott 'Extraterritoriality and Territorial Extension in EU Law', 62:1 *American Journal of Comparative Law* (2014) 87 and 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction', 57:4 *American Journal of Comparative Law* (2009), 897.

⁹ In addition to this journal, see also *Comparative Environmental Law and Regulation*, for instance.

¹⁰ This is the notable case of environmental liability, as discussed in the contribution by Orlando to this volume, but also environmental impact assessment and procedural environmental rights. It is of course impossible to do justice to the existing literature in that regard, but see, eg: W. Tilleman, 'Public Participation in the Environmental Impact Assessment process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community', 33:2 *Columbia Journal of Transnational Law* (1995), 337; A. Harding (ed), *Access to Environmental Justice: A Comparative Study* (Brill, 2007); and M. Hinteregger (ed), *Environmental Liability and Ecological Damage in European Law* (Cambridge University Press, 2008).

¹¹ E. Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', 21:2 *Journal of Environmental Law* (2009), 213, at 242-243.

¹² Ibid. See also J. Darpo and A. Nilsson, 'On the Comparison of Environmental Law', 3:1 *Journal of Court Innovation* (2010), 315.

law beyond the inter-State paradigm that traditionally characterizes its study.¹³ It has also attracted an increasing number of environmental law scholars studying the mutual influences between international and EU environmental law, as well as national and sub-national law.¹⁴ Global environmental law has been defined as ‘law that is international, national and transnational in character all at once’ and comprises ‘the set of legal principles developed by national, international and transnational environmental regulatory systems to protect the environment and manage natural resources.’¹⁵ The emergence of global environmental law has been considered a consequence of the increasing public powers exercised by international organizations (as opposed to States) as international law-makers.¹⁶ Global environmental law can also be seen to have the potential to better understand the role of indigenous peoples’ and local communities’ customary laws, whose study generally remains in its infancy,¹⁷ in implementing and influencing international environmental law.¹⁸

Along similar lines, global environmental law may be an essential perspective to understand the influence of transnational legal advisors (NGOs and bilateral development partners) on the development and implementation of environmental norms. It has already been noted that NGOs actively support creative linkages between communities’ customary law and international norms on sustainable development, often by-passing States, but that there is still a need to better understand their influence on the development of sustainable development norms¹⁹ at different levels of regulation.

A perspective informed by global environmental law, understood as the promotion of environmental protection through a plurality of legal mechanisms relying on a plurality of legal orders, thus prompts the study of environmental law at the international, regional, national and sub-national levels as *inter-related* and *mutually influencing* systems. And it calls for an analysis of the practice of non-State actors, particularly international organisations, international networks of experts providing

¹³ E. Hey, ‘Common Interests and the (Re)constitution of the Public Space’ 39:3 *Environmental Policy and Law* (2009), 152.

¹⁴ E. Morgera, ‘Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law’, 23:3 *European Journal of International Law* (2012), 743, on which this section draws on. See also the contribution by Orlando in this issue.

¹⁵ T. Yang and P. Percival, ‘The Emergence of Global Environmental Law’, 36:3 *Ecology Law Quarterly* (2009), 615.

¹⁶ E. Hey, ‘Global Environmental Law and Global Institutions: A System Lacking “Good Process”’, in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge University Press, 2010), 45.

¹⁷ P. Ørebech et al (eds), *The Role of Customary Law in Sustainable Development* (Cambridge University Press, 2006).

¹⁸ An interesting focus for study is provided, for instance, by Article 12(1) of the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing under the Convention on Biological Diversity. For a discussion, see E. Morgera, E. Tsoumani and M. Buck, *Unraveling The Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Martinus Nijhoff, 2014) at 216-22; S. Vermeylen, ‘The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law’ 9:2 *Law Environment and Development Journal* (2013), 185; K. Bavikatte and D. Robinson, ‘Towards a People’s History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing’, 7:1 *Law, Environment & Development* (2011), 3, at 45-46; and Morgera, note 14 above, at 760-763.

¹⁹ Ørebech et al, note 18 above.

advice on environmental legislation across the globe, international civil society, bilateral donors, indigenous peoples and local communities, and the private sector.²⁰

In that sense, global environmental law is a promising research agenda,²¹ but its theorization is still in the making. For this reason it appears useful to build on Neil Walker's recent theoretical reflection on the broader concept of global law, which draws on specific examples from the environmental sphere and immediately speaks to key characteristics of global environmental law. According to Walker, global law embodies a commitment to understanding the 'pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes' that have a global reach (in other words, that are 'present across and between a range of [legal] sites and purport to cover all actors and activities relevant to its remit across the globe') and have a global justification ('an endorsement or commitment to a shared purpose or common political morality that may be explicitly invoked or implied').²² This argument appears particularly helpful to distinguish global law from transnational law - a broader²³ concept that comprises "all law which regulates actions or events that transcend national frontiers," including public and private international laws, as well as other rules which do not wholly fit into these categories.²⁴ While both transnational law and global law serve to illuminate forms of law *beyond* the State, global law specifically hinges upon the above-mentioned global justification, the increasingly functional role of the state sovereignty to the protection of the common interest of humanity,²⁵ including communities outside States' own borders,²⁶ and the pursuit of global public goods.²⁷ Such global justification does not circumscribe global (environmental) law to normative patterns developed exclusively by states and/or international organizations with other stakeholders, but extends to those developed solely by non-state actors as long as they are centered on a global justification.

Walker also emphasizes that global law finds itself 'somewhere between settled doctrine and an aspirational approach'.²⁸ It is seen as a self-conscious and reflexive endeavour in which specialist (professional and academic) communities are not only 'sources of expertise and learning in matters of the emergent global law and as instruments of its application' but also 'active players in the fashioning and shaping of global law'.²⁹ Global legal scholars therefore also engage in advocacy by identifying and anticipating normative patterns with the aim of addressing the perceived limits of certain areas of international law through 'a more selective reading of its sources and areas of impact'.³⁰ This appears particularly fitting in relation to global environmental

²⁰ See generally Morgera, note 14 above

²¹ Ibid, at 746. See also E. Morgera, 'The Future of Law and the Environment: The Emergence of Global Environmental Law' in Muller et al (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl Academic, 2012), 39.

²² N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015) at 11-12, 14 and 18.

²³ Ibid, at .

²⁴ P. Jessup, *Transnational Law* (Yale University Press, 1956), at 136.

²⁵ Hey, note 13 above; Morgera, note 14 above, at 746.

²⁶ E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of State to Foreign Stakeholders' 107:2 *American Journal of International Law* (2013) 295.

²⁷ Ibid; and Morgera, note 14 above. But see also N. Walker, 'Human Rights and Global Public Goods: The Sound of One Hand Clapping' (SSRN, 2015).

²⁸ Walker, note 23 above, at 18 and 21.

²⁹ Ibid, at 27 and 46.

³⁰ Ibid, at 152 and 112-113.

challenges, as consensus has become increasingly difficult to reach in certain areas of multilateral environmental negotiations and/or 'more decentralised forms of implementation and more iterative and reflexive styles of policy-making' are often relied upon in the further development or implementation of (but also possibly for circumventing, pre-empting or unduly influencing³¹) international environmental law.³² In this vein, legal studies from a global law perspective gauge incipient trends and identify future projections, in an iterative process of mapping, scanning, schematizing and (re)framing normative patterns, with a view to understanding the 'capacity of law, drawing upon deep historical resources, to recast the ways in which it addresses some of the problems of an interconnected world.'³³ This allows global (environmental) jurists to contribute to the search for justification of the authority of new legal phenomena.³⁴ It remains to be clarified, however, whether seeing global (environmental) law as merely a research agenda or methodology does not overlook any possible original normative content. This is a question that will be returned to in the conclusions.

In effect, Walker's words clearly evoke concepts resonating with comparative legal scholarship. According to the typology of global law scholarship that he draws, what seems most relevant from an environmental perspective is 'functionally-specific (new) legal pluralism' as the study of 'the terms of exchange between different legal systems, in the absence of any mutually acknowledged hierarchy' to better understand and systematize the multiple ways in which global legal phenomena seek to achieve specific sectoral goals.³⁵ This proposed categorization of global environmental law chimes with the comparative lawyers' understanding of environmental law as problem-oriented.³⁶ In addition, Walker's reflection on the role of global (environmental) jurists seems to imply a connection between the comparative legal method and global law scholarship. He suggests that global jurists delve into the study of the interactions between national and transnational law, as well as the reliance of global legal phenomena on different legal traditions, cultures and orders "from the micro-comparative to the universal."³⁷

The role and limitations of comparative legal methods have been a recurrent theme in the writings of another prominent voice in the global law debate, William Twining.³⁸ And it also resonates with the scholarship on global environmental law, whereby the

³¹ See, for instance, E. Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' 16 *Cambridge Yearbook of European Legal Studies* (2014), 109.

³² Walker, note 23 above, at 108, making reference to the specific case of climate change and marine protection as areas 'where there is increasing failure to deliver grand settlements across significant interest divisions and across the broader set of sovereign States who assert a significant stake in these settlements', and hence a reliance on 'less unified and settled institutional structures with wider forms of participation and accountability, more decentralised forms of implementation and more iterative and reflexive styles of policy-making, so emphasis on dispersed influence and incremental policy development.'

³³ *Ibid.*, at 143 and 110.

³⁴ *Ibid.*, 21-25.

³⁵ *Ibid.*, at 103-104.

³⁶ D. Nelken, 'Comparative Law and Comparative Legal Studies' in E. Orucu and D. Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007), 3, at 4.

³⁷ N. Walker, 'The Jurist in a Global Age' (SSRN, 2015), at 21.

³⁸ W. Twining, 'Diffusion of Law: A Global Perspective' 36:49 *Journal of Legal Pluralism and Unofficial Law* (2004) 1.

interaction of different legal orders has been considered the result of transplantation – the borrowing of legal principles and tools from one country to another, but also from the national to the international level,³⁹ or of convergence – the spontaneous similarities in national legal responses to similar external pressures and the linking of national systems in response to the growing constraints imposed by international environmental law⁴⁰ and the expectations international environmental law creates in terms of implementation by private entities.⁴¹ These areas of contact provide a promising starting point for a more systematic debate on the contributions of comparative legal methods to global environmental law research. They need, however, to take fully into account the self-doubt and ongoing concerns that characterize comparative legal scholarship.

2. Comparative law and/or comparative legal method(s)

The nature of comparative law has been a traditional preoccupation for comparative legal scholars. While comparative law certainly does not comprise a distinct area of law (in other words, it is not a distinct body of rules), it is seen as a method, or rather a variety of methods:⁴² the systematic study of particular legal traditions and legal rules on a comparative basis,⁴³ a way of looking at legal problems through comparison to "gain insights that would be denied to one whose study is limited to the law of a single country."⁴⁴ In addition, it is seen as leading to the accumulation of a distinct body of knowledge,⁴⁵ albeit the question of whether there is, or should be, a canon (the established knowledge that provides the expected common ground for everyone in the field, giving a discipline coherence and continuity) remains open.⁴⁶

The scope of comparative law has also been extensively debated. While traditionally comparative law is concerned with comparing laws of different countries, it is now widely acknowledged that the comparative method can be applied in different ways to different levels, forms, stages⁴⁷ or aspects of regulation with a view to understanding the infinite varieties of the legal expressions of human experience.⁴⁸ And this is also reflected in existing environmental legal scholars and practitioners that have engaged

³⁹ Eg B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', 27:4 *Ecology Law Quarterly* (2001), 1295.

⁴⁰ Yang and Percival, note 15 above.

⁴¹ Hey, note 13 above, at 50.

⁴² G. Samuel, *An Introduction to Comparative Law Theory and Method* (Hart, 2015).

⁴³ P. de Cruz, 'Comparative Law: Functions and Methods', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2010, online version) paras. 2-5.

⁴⁴ R. B. Schlesinger et al, *Comparative Law* (6th edn, University Casebook Series, 1998), at 2.

⁴⁵ M. Reimann, 'Comparative Law and Neighbouring Disciplines' in M. Bussani and U. Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012) 14, at 14.

⁴⁶ See generally, M. Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' 50:4 *American Journal of Comparative Law* (2002), 671, at 696.

⁴⁷ In that direction, see the contributions by Sindico and Hawkins to this issue.

⁴⁸ As elegantly put by R. Cotterell, 'Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity' in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007), 133, at 147 and 152.

in vertical (including bottom-up) comparisons between international and national law,⁴⁹ or horizontal comparisons across international legal instruments.⁵⁰ It thus appears that comparative law is abandoning its focus on the nation-state and is increasingly assuming a global dimension.

In effect, it has been argued that comparative law has always been global in nature "because it consciously detaches itself from the limits set by the legal system of the nation-State ...it dismisses borders from the viewpoint of knowledge production."⁵¹ And recent comparative law textbooks include explicit reflections on globalization.⁵² That said, there is still a preoccupation that individual comparative legal studies remain over-reliant on a 'country and western' model focusing on the transplantation of law from developed to developing countries,⁵³ and that they are unempirical and 'unduly influenced by a simplistic model of processes of diffusion.'⁵⁴ Recent scholarship in comparative law has therefore been characterized by deep self-reflection with a view to moving away from post-colonial biases⁵⁵ and better understanding legal diversity both in terms of local influences and emerging global patterns.⁵⁶ As a result, the object of study of comparative law has also been revisited. The (in)famous notion of legal transplant⁵⁷ remains a powerful evocation of the fact that most legal systems occur as the result of borrowing from foreign systems, although the degree to which certain laws are inspired by foreign ones varies significantly and more critical thinking has been devoted to the understanding of processes of reflective learning from abroad.⁵⁸ Starting from the viewpoint that all

⁴⁹ Eg Wiener, note 39 above, with regard to reliance on national legal developments in the negotiations of the Kyoto Protocol. See also more generally A. Momirov and A. Naudé Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law', 2:3 *Erasmus Law Review* (2009), 291.

⁵⁰ Once again, legal scholarship on environmental liability is rich in vertical and horizontal comparisons: eg, M. Bowman and A. Boyle (eds.) *Environmental Damage in International and Comparative Law* (Oxford University Press, 2002). A more recent case can be found in the mandate provided by the parties to the Nagoya Protocol to the CBD Secretariat to study different international mechanisms for the multilateral sharing of benefits, with a view to consider whether and how to develop a global, multilateral benefit-sharing mechanism under the Protocol: Nagoya Protocol Decision 1/10 (2014).

⁵¹ J. Husa, *A New Introduction to Comparative Law* (Hart, 2015), at 20.

⁵² Eg W. Twining, 'Globalization and Comparative Law', in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007) 69; de Cruz, note 1 above, ch 14; and Siems, note 4 above, Part III ('Global Comparative Law').

⁵³ W. Twining 'Social Science and Diffusion of Law', 32:2 *Journal of Law & Society* (2005), 203, at 203-5.

⁵⁴ *Ibid.*, at 217.

⁵⁵ This is most visible in revised classifications of legal systems: see note 106 below. See also contribution by Vermeylen in this issue.

⁵⁶ W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006), at 594-613, particularly at 596 where he refers to 'pluralistic globalisation' as the constant, visible and invisible, dynamic interactions between global and local elements of law; W. Menski, 'Beyond Europe' in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007), 189, at 210.

⁵⁷ A. Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1993).

⁵⁸ Siems, note 4 above, at 197.

legal systems are hybrid or mixed to some extent or other, recent comparative law increasingly seeks to understand diverse processes of transposition such as - to use an environmentally friendly terminology - 'fertilisation, pollination, grafting, intertwining, osmosis and pruning,' to illuminate the 'origins, relationships, overlaps and interrelationships, and diverse fertilisers', including social and cultural contexts, of legal phenomena.⁵⁹ The notion of norm diffusion⁶⁰ can perhaps better capture the object of modern comparative law, as a whole variety of occurrences whereby 'one legal order influences another in some significant way.'⁶¹ While its relative merits compared to other terminology used in comparative legal literature (including a contemporary and nuanced understanding of legal transplants) can be debated, norm diffusion appears particularly interesting for present purposes for two reasons. First, it is also used in other disciplines, thereby facilitating the identification of points of contact among them and possibly paving the way for inter-disciplinarity. In addition, according to Twining, the concept of norm diffusion resonates more clearly with a global perspective: it appears to encapsulate a more dynamic approach to the understanding of the relations and mutual interactions between different levels of legal ordering (which are not necessarily static or clearly defined) of human relations at different geographical levels, including soft law, transnational law and the customary law of indigenous peoples and local communities.⁶² According to Twining, in other words, norm diffusion may represent a more immediate label to link comparative law and a global perspective in order to unravel diffuse and/or complex processes of interaction between different legal orders, deriving from multiple sources and arriving at multiple destinations, resulting from cross-level transfers and reciprocal influences, emerging in formal, informal, semi-formal or mixed configurations over a continuous and often lengthy process as the result of interactions between a variety of State and non-State actors (including the private sector, NGOs, individuals and communities, activists and lobbyists, as well as teachers and researchers).⁶³ These processes are clearly at play in the specific realm of global environmental law, as demonstrated by the presence of comparative law in global environmental practice.

3. The functions of comparative law and their relevance to global environmental law

Comparative law may serve a variety of functions. It can be undertaken as part of legal education, to encourage students to be more critical about the functions and purposes of environmental law in their own countries, or as a means of supplementing judicial decisions and supporting the harmonization of law.⁶⁴ These functions appear

⁵⁹ E. Orucu, 'Law as Transposition', 51:2 *International and Comparative Law Quarterly* (2002), 205; and E. Orucu, 'What is a Mixed Legal System: Exclusion or Expansion?', 12:1 *Electronic Journal of Comparative Law* (2008), at 11.

⁶⁰ See also contribution by Cotula and by Parks and Morgera to this issue.

⁶¹ Twining, note 38 above, at 5 and 14. See also E Orucu, 'Law as Transposition,' note 59 above.

⁶² Twining, note 38 above, at 11-12.

⁶³ Ibid, particularly table at 17.

⁶⁴ de Cruz, note 43 above, paras. 22-57.

quite relevant for EU environmental law, for instance.⁶⁵ Two other functions deserve particular attention from a global environmental law perspective: first, comparative law can help better understand the development and effectiveness of international (environmental) law and second, it can support (environmental) legal reforms.

3.1. Global dimensions of the comparative legal method to investigate the development and the effectiveness of international environmental law

Traditionally, the comparative legal method is seen as the way to discover or elucidate general principles of international law, both in the more classical understanding of principles emerging from the domestic law of different countries,⁶⁶ but also in more recent attempts to derive general principles from other sources of international law.⁶⁷ Comparative environmental law can also serve to assess whether a country has complied with its international obligations,⁶⁸ thereby helping to assess the effectiveness of international environmental law. It has also been used to survey national practice in preparing a new international treaty.⁶⁹

That said, comparative legal scholars have lamented the lack of attention paid to international law within comparative legal studies and lack of engagement or dialogue with international legal scholars.⁷⁰ International lawyers, for their part, have underscored the need to engage more with comparative law to help meaningfully implement and enforce international law by legitimizing efforts to internalize international obligations in a specific context in a way that is informed by and articulated with reference to local values, "avoiding distortions of top-down formulations that neglect grass-roots perspectives."⁷¹ While these remarks have been formulated with international human rights law in mind, they appear relevant also for comparative environmental law. Although, as noted above, environmental lawyers have already engaged in vertical and horizontal comparisons involving international law, much more remains to be done both in terms of sensitively tackling the challenges involved in those exercises and of engaging with a broader and more varied range of legal phenomena. This is particularly the case of international environmental obligations that have impacts on the human rights of indigenous peoples and local communities,⁷² the study of which needs to factor in communities' customary laws, as well as regional human rights regimes - where they exist, and the interactions of both with national legal frameworks.

⁶⁵ See contributions by Roger and by Orlando to this issue. For a (not specifically environment-related) discussion on the EU judiciary, see K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', 52:4 *International and Comparative Law Quarterly* (2003), 873.

⁶⁶ Art. 38(1) of the ICJ Statute. For a discussion, see J. Ellis, 'General Principles and Comparative Law', 22:4 *European Journal of International Law* (2011), 949.

⁶⁷ R. Wolfrum, 'General International Law (Principles, Rules and Standards)' in R. Wolfrum (ed.), *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2010, online version), paras 33-36.

⁶⁸ See the "scoring system" under the National Legislation Project of the Convention on International Trade in Endangered Species (CITES) to determine whether domestic measures adequately implements CITES, by categorizing each country's legislation as meeting all, some or none of the requirements for implementing CITES.

⁶⁹ de Cruz, note 43 above, para 55.

⁷⁰ Reimann, note 46 above, at 680.

⁷¹ A. Obiora, 'Toward an Auspicious Reconciliation of International and Comparative Analyses' 46 *American Journal of Comparative Law* (1998), 669, at 669-670 and 676-678.

⁷² See contributions by Vermeylen and Bessa to this issue.

Other, global dimensions come to mind as directions for future comparative legal research: to what extent does domestic law play a role in the negotiations of multilateral environmental agreements, not only as sources of inspiration for new solutions at the international level, but also as a limitation to the flexibility of national negotiating positions? On the latter point, for instance, the negotiations of the language on indigenous peoples in the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing under the Convention on Biological Diversity provide an interesting example of the impacts on the development of international law of limitations deriving from domestic regimes.⁷³ In addition, to what extent can comparative law serve to assess the effectiveness of international soft law in providing guidance to national environmental law-makers? And to what extent can comparative law help understand the implications of bilateral agreements⁷⁴ on other international, national and sub-national legal orders?

3.2. Global dimensions of the comparative legal method to support environmental law reform

Comparative law is also widely used as an aid to law reform. To illustrate the global environmental law dimensions of this function of comparative law, the legal advisory services of intergovernmental or hybrid international organizations represent a very interesting and still little-studied practice.⁷⁵ The UN Environment Programme (UNEP),⁷⁶ the Food and Agriculture Organization of the United Nations (FAO),⁷⁷ the World Bank,⁷⁸ and the International Union for Conservation of Nature (IUCN),⁷⁹ have all been involved to different degrees both in supporting national environmental legal reforms on the basis of their comparative experience, as well as in the publication of comparative environmental legal studies. By way of example, the activities of FAO will be discussed here more in detail, in order to identify their practical relevance from a comparative environmental law perspective and outstanding research questions from a global environmental law perspective.

The legal office of FAO provides, upon demand, direct assistance to its State Members in designing or revising legal frameworks for agricultural development and the management of renewable natural resources, ranging from land, water, fisheries, plants, animals to food, forestry, wildlife, biodiversity and trade laws. Linked to that activity, the legal office also conducts and promotes research on legislative developments in the food and agriculture sector and in renewable natural resource management, regularly publishing comparative legal studies (FAO Legislative

⁷³ See, for instance, the references to 'established rights' and to 'prior informed consent or approval and involvement' in Articles 5-7 of the Nagoya Protocol and discussion in Morgera, Tsioumani and Buck, note 19 above, at 122-126, 152-154 and 170-177.

⁷⁴ R. Sacco, 'The Sub-Saharan legal tradition', in M. Bussani and U. Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012), 313, at 337. This point was discussed in Morgera, note 14 above. See also the contribution by Cotula to this issue.

⁷⁵ Yang and Percival, note 15 above, at 647-648.

⁷⁶ <<http://www.unep.org/delc/Default.aspx?tabid=54403>>.

⁷⁷ <<http://www.fao.org/legal/development-law/en/>>.

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<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,menuPK:445640~pagePK:149018~piPK:149093~theSitePK:445634,00.html>>.

⁷⁹ <http://www.iucn.org/about/work/programmes/environmental_law/>.

Studies and FAO Legal Papers Online).⁸⁰ These studies typically survey the applicable international legal framework to a certain topic and then compare national legal developments across the globe, or in specific regions, to identify trends and map legislative options. They can thus be regarded as "variable-oriented" comparative legal studies that have a significant degree of generalizability of knowledge, because of their wide geographical scope, but the weakness of which is the limited depth of the study of legal culture or context. From a comparative legal scholarship perspective, therefore, these studies (as well as similar ones produced by IUCN, UNEP and the World Bank) are charting basic alternatives descriptively,⁸¹ which may provide a helpful starting point for the selection of comparators and the conduct of more in-depth comparative analysis.

Another key role of FAO for comparative environmental law is the collection of data on national legislation developed by FAO Members,⁸² by maintaining and updating an online comprehensive database (FAOLEX) on national and international legal instruments on food, agriculture and renewable natural resources;⁸³ and by cooperating with UNEP and IUCN in the running of the umbrella database ECOLEX,⁸⁴ which also included national judicial decisions and legal scholarship on environment and natural resources.⁸⁵ The FAO legal office selects, indexes and summarizes in English, French or Spanish national legal texts pertaining to FAO's mandate, and makes available globally the full text of the document in the original language and/or in the language of communication used by the originating country. This and related⁸⁶ databases respond to a number of key concerns of comparative lawyers. First, they almost entirely resolve the issue of accessibility of relevant legal materials, which is a major factor for thorough comparative legal research.⁸⁷ Second, they help researchers identify sources that can be trusted.⁸⁸

The FAO legal research and its collection and systematization of national legal developments greatly contribute to (as well as are fed by) FAO's in-country legal advisory services. In terms of overall approach, FAO legal advisory work appears to reply to several concerns raised in academic comparative research. First, FAO works closely with local lawyers (national legal consultants): FAO legal officers, as foreign lawyers, are thus more likely to see the hidden assumptions of a legal system, but need the support of local lawyers to avoid mistakes and misunderstandings of the local law. Second, FAO legal advisory work leads to an interactive exchange among locally-based academics, practitioners, government officials and politicians,⁸⁹ as well as a variety of stakeholders that are affected by the law under discussion, such as non-

⁸⁰ <<http://www.fao.org/legal/publications/legislative-studies/en/>> and <<http://www.fao.org/legal/publications/legal-papers/en/>> respectively.

⁸¹ Husa, note 51 above, at 109.

⁸² Based on an obligation for FAO Members to report to FAO on the adoption of national legislation within the purview of the Organization: Article XI of the FAO Constitution.

⁸³ <<http://faolex.fao.org>>.

⁸⁴ <www.ecolex.org>.

⁸⁵ FAO Manual Section 107.3.3.

⁸⁶ Eg, Port-Lex, <<http://www.fao.org/fishery/psm/collection/en/>>; WaterLex, <<http://faolex.fao.org/waterlex/index.htm>>; and the National Aquaculture Legislation Overview, <<http://www.fao.org/fishery/collection/nalo/en/>>.

⁸⁷ Harding and Leyland, note 2 above, at 332.

⁸⁸ Husa, note 51 above, at 117.

⁸⁹ Harding and Leyland, note 2 above, at 331.

governmental institutions, rural communities and the private sector. In-country consultations take place on the basis of an assessment of the relevant legislative framework in the specific sector, as well as in sectors that are linked to it (for instance, when providing advice on forest law reform, the assessment will also analyse laws on land, biodiversity, protected areas, taxation, etc). The assessment is carried out by a national legal consultant in the first instance, sometimes supported by an international legal consultant with comparative legal experience in the sector, and is back-stopped by the FAO legal officer. The assessment aims to familiarize relevant stakeholders with the particular national legal framework to enable them to participate in the consultations, as well as to identify whether legislation is outdated, has gaps or contradictions, and is in line with relevant international instruments. International legal consultants and FAO legal officers provide advice on legislative drafting, on the basis of weaknesses and constraints identified in the existing legal systems, with a view to providing advice on compliance with international law, drawing on options identified through comparative experience in other countries in which FAO has worked. Legal options and draft legal instruments are discussed and refined through multi-stakeholder consultation. In the interaction with national and international legal consultants through in-country missions and remote collaboration, FAO legal officers also provide on-the-job training and aim to spread good practices in the implementation of international standards that have been identified by comparing legislative experiences in other FAO State Members. While the advice provided by FAO, as well as UNEP, IUCN and the World Bank, is meant to be neutral, particularly when compared with legislative advice provided by bilateral donors who may have a vested interest in the natural resource sector at stake,⁹⁰ a critical approach to the study of these global practices would certainly be useful. Global environmental scholars have already underscored the limited accountability of international organizations and the need to take into account power dynamics in that regard.⁹¹ Due to budget cuts in the UN System, there are also increasing instances in which legal advisory services are provided by international organizations on the basis of bilateral donors' funding, rather than core funding,⁹² which may create further complexities in understanding the role of politics in the context of these influential legal advisory services and their contribution to spread "good practices."

Critical analysis should also be devoted to complex and under-studied interactions between the body of comparative legal knowledge accumulated with research and in-country advisory services and the advice that FAO legal officers may provide for the development of new international, hard and soft, legal instruments, such as the Principles for Responsible Investment in Agriculture and Food Systems,⁹³ and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries

⁹⁰ This problematique has for instance come to the fore with regard to the need for legislative support of developing countries that are providers of genetic resources and the offer of that support from developed countries that are interested in gaining access to the resources: see Morgera, Tsoumani and Buck, note 19 above, at 312-313; and Morgera, note 14 above, at 763.

⁹¹ Hey, note 16 above; and more generally contribution by Vermeulen in this issue.

⁹² See the case of the Forest Law Enforcement, Governance and Trade (FLEGT) programme funded by the EU and implemented in part through FAO discussed in E. Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013) 194.

⁹³ Endorsed by the Committee on World Food Security in October 2014, <<http://www.fao.org/3/au866e.pdf>>.

and Forests in the Context of National Food Security.⁹⁴ The same applies to UNEP (and its Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters,⁹⁵ for instance) or IUCN (and its Guidelines for Protected Areas Legislation⁹⁶). These guidelines, in turn, become international standards that inform future in-country legal advisory services carried out by these organizations, but also by other actors, leading to yet other complex dynamics of norm diffusion.

4. Comparative legal methodologies

As just demonstrated, the points of contact between the theory and practice of comparative law and global environmental law also raise new research questions of their own. How to tackle them? Much remains to be clarified with regard to methodology. Environmental lawyers, for their part, have called for "*rigorous techniques for analysing the interrelationship between local, national, regional and international environmental laws*" and the identification of the "*proper methodology for undertaking such analyses*."⁹⁷ On the comparative law side, however, there does not seem to be such clear-cut answers.⁹⁸

Rather, comparative lawyers widely acknowledge that their methodology is open-ended: it depends on the specific purpose pursued by a specific comparative law endeavour.⁹⁹ Others have emphasized that comparative law methodology is "intensely political and quite personal,"¹⁰⁰ or even a life-long¹⁰¹ quest and quintessentially experimental.¹⁰² Comparative legal methods give great liberty to the researcher, thriving on her/his propensity for inquisitive cosmopolitanism,¹⁰³ but as a result are "enduringly risky."¹⁰⁴ This is quite neatly exemplified in the scholarly debate on macro-comparisons and the need (or not¹⁰⁵) to build, in undertaking comparative legal research, on the understanding of legal families, legal patterns, legal traditions or other classifications of legal systems that refer to "deep-rooted characteristics shared

⁹⁴ Endorsed by the Committee on World Food Security in May 2012, <<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>>.

⁹⁵ Adopted by the UNEP Governing Council in February 2010, <http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf>.

⁹⁶ Published by IUCN as an Environmental Policy and Law Paper No 81 in 2011, <<https://portals.iucn.org/library/efiles/documents/eplp-081.pdf>>.

⁹⁷ Fisher et al, note 8 above, at 241-242 (emphases added).

⁹⁸ Eg Samuel, note 42 above; Siems, note 4 above, Part II.

⁹⁹ E. Orucu, 'Developing Comparative Law', in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007), 43, at 43 and 46-48.

¹⁰⁰ W. Menski, 'Beyond Europe', note 56 above, at 191.

¹⁰¹ M. Bussani and U. Mattei, 'Diapositives Versus Movies - The Inner Dynamics of the Law and its Comparative Account', in M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012), 3, at 7.

¹⁰² Husa, note 51 above, at 96.

¹⁰³ Ibid, at 207- 208.

¹⁰⁴ R. Cotterrell, 'Is it Bad to be Different? Comparative Law and the Appreciation of Diversity' in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007), 133, at 152.

¹⁰⁵ '...if comparative law is done out of a practical interest with an intention to carry out objectives of a practical origin, the question of classification of the world's legal systems or the results of the classification is hardly very interesting': Husa, note 51 above, at 237.

by a number of legal orders.¹⁰⁶ At the very least, this is considered helpful to lower the knowledge threshold when foreign law is examined.¹⁰⁷ But in this as well as other foundational questions of comparative legal research, it seems that a dialectic and pluralistic approach is called for.¹⁰⁸

Not only does comparative law relies on a plurality of methodologies, but it also traditionally faces several, practical methodological challenges, such as linguistic and terminology problems, cultural differences between legal systems, the arbitrary selection of the object of study, the tendency to impose one's native legal conceptions and expectations on the system compared, prejudice, or the exclusion/ignorance of extra-legal rules (informal practices which operate outside the law, non-legal phenomena that ultimately influence the state of the law, and/or enforcement status and capacities).¹⁰⁹ In many ways, the "opportunities for comparative law are always limited to some extent," so comparison entails a process of coming to terms with these challenges, recognizing the risk factors involved and factoring them systematically in the research frame in order to minimize them.¹¹⁰ It also implies accepting that these risks can be eliminated altogether.

Against this background, the work of the comparative lawyer resembles that of a detective: an informal, almost intuitive, knowledge process that arises from methodologically looking for clues in the material identified, proceeding towards explanations up to the point where the different interpretative elements fit together into a thick narrative that attempts to explain differences and similarities,¹¹¹ as well as simultaneously conceptualizing the research objects: a reconstruction of the law from the viewpoint of an epistemic outsider.¹¹² Through this open-ended process of knowledge acquisition, comparative legal reasoning holds the promise of advancing understanding that precludes irreconcilable difference and rather nurtures sustainable legal diversity: it builds bridges, through acceptance (rather than tolerance) of diversity, and deeper appreciation of mutual interdependence.¹¹³

5. Inter-disciplinarity

The understanding of sustainable diversity among legal traditions is put forward by Glenn, whose widely-appreciated approach to comparative legal research integrates anthropology and sociology.¹¹⁴ Comparative legal scholars are in effect embracing

¹⁰⁶ Eg, U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal System', 45:1 *American Journal of Comparative Law* (1997) 5; E. Orucu, 'A General View of "Legal Families" and of "Mixing Systems"', in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007) 169; and Siems, note 4 above, at 72-94. More generally, see Menski, *Comparative Law in a Global Context*, note 56 above, at 25-81.

¹⁰⁷ Husa, note 51 above, at 237.

¹⁰⁸ Samuel, note 42 above, at 178-179.

¹⁰⁹ de Cruz, note 43 above, paras 6-20.

¹¹⁰ Husa, note 51 above, at 24.

¹¹¹ G. Danneman, 'Comparative Law: Study of Similarities or Differences?', in M. Reimann and N. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2007) 383; and P. Legrand, 'The Same and the Different', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003). See also discussion of Legrand's work in the contribution by Vermeylen in this issue.

¹¹² Husa, note 51 above, at 155.

¹¹³ Glenn, note 5 above, at 48 and 371-378.

¹¹⁴ Husa, note 51 above, at xx.

bolder inter-disciplinary approaches that build on a pre-existing reliance on the sociology of law.¹¹⁵ This finds reflection, for instance, in the global environmental law practice of FAO described above, as in-country legal advisory services involve multidisciplinary team work: the assessment of the applicable legal framework, and the recommendations for its reform, are informed by an understanding of social, ecological and economic conditions. Interestingly, this practice also points to the usefulness and need for collaboration in inter-disciplinary endeavours.

The critical importance of inter-disciplinarity is also emphasized in the scholarship on global law. Walker calls upon scholars to engage both in a reflective historical inquiry that can draw on the humanities and in the analysis of emergent trends that can draw on social sciences.¹¹⁶ Twining, in turn, has invited global law scholars to rely on the concepts and approaches to the study of norm diffusion that can be found in the social sciences, in order to understand - particularly through empirical research - the role of the behavior, perceptions and interactions of different actors in particular contexts, as well as the paths through which a legal concept and legal practices may spread from the bottom up, transversally or outside of the law.¹¹⁷ Twining also emphasizes that interdisciplinarity can also foster awareness of bias that have concerned comparative lawyers and should preoccupy global environmental lawyers alike, such as the assumption that all objects of diffusion are desirable, progressive or innovative, or the assumption that all examples of diffusion of law fit neatly into a means-end, problem-solving framework.¹¹⁸

6. Conclusions

The points of convergence between the scholarships on comparative law and on global law offer concrete opportunities for embedding more explicitly comparative legal methods into the growing scholarly debate on global environmental law, and for thinking more critically about the practice of global environmental law and its mutual relationship with comparative study and experience.

Besides these promising routes for further research, a discussion of comparative legal methods also helps put spotlight on key existential questions of global environmental law that remain to be systematically tackled. Is global environmental law a governance system where non-state actors are key addressees and also key norm-creators with limited accountability?¹¹⁹ Is global environmental law a body of law that encompasses principles common to international, transnational and national environmental law?¹²⁰ While it seems clear that global environmental law is a

¹¹⁵ D. Nelken, 'Comparative Law and Comparative Legal Studies', in E. Orucu and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart, 2007) 3; and M. Reinmann, 'Comparative Law and Neighbouring Disciplines', in M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012) 13; and part II of Siems, note 4 above.

¹¹⁶ Walker, note 37 above, at 1.

¹¹⁷ Twining, note 40 above.

¹¹⁸ Ibid. See contribution by Morgera and Parks in this issue.

¹¹⁹ This seems the position advanced by Hey, note 16 above.

¹²⁰ This seems the position advanced by Yang and Percival note 13 above.

methodology for research and teaching,¹²¹ it remains to be ascertained whether the practice of global environmental law can lead to innovative forms of law, be that the result of an increasingly conscious and strategic reliance on the mutual influences between different legal orders,¹²² or of the jurisgenerative role of global scholars and practitioners.¹²³

In coming to grips with this question, it seems that the preceding discussion of comparative legal methods has also unearthed some of the qualities of global environmental lawyers. They need to be aware of, frankly disclose and critically engage with the opportunities, risks and limitations of their research methodologies, in an adaptive process of self-reflection. They need to be open to collaboration in empirical, intra- and inter-disciplinary research. They need to be bold and imaginative, but also responsible,¹²⁴ in appreciating diversity and mutual interdependence in an iterative process of engagement with other experts and stakeholders. Global environmental lawyers thus need to admit that they are active participants in - not detached observers of - the complex legal phenomena they are comparing.

¹²¹ Morgera, note 21 above; and on the teaching methodology specifically, see Wiener, note 39 above, at 1368.

¹²² For instance, through the use of bilateral agreements that, at least on the face of it, purport to support the implementation of international environmental treaties by spurring national legal reforms and processes: Morgera, note 14 above; and S Jinnah and E Morgera, "Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda" (2013) 22 *Review of European Community and International Environmental Law* 324-339.

¹²³ Walker, note 37 above.

¹²⁴ See contribution by Vermeulen to this volume.